In the Supreme Court of the United States

OCTOBER TERM, 1969

No 522

ERICH SPILLMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1969. A petition for rehearing was denied on July 23, 1969. Pursuant to application on August 23, 1969, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to September 20, 1969.[1] The petition was filed on August 27, 1969.

[1] Although petitioner asserts (Pet. 2) that a petition for rehearing was denied by the court of appeals on July 24, 1969, the record reveals the date of denial to have been July 23, 1969. See R. Vol. I. The application for an extension of time within

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for mailing obscene material in violation of 18 U.S.C. 1461, where the obscene nature of the matter mailed was stipulated, the trial court properly refused to give petitioner's requested instruction that the jury could find him guilty only if it found that he had a specific intent to arouse the prurient interest of the recipient of the material.

2. Whether the present prosecution is consistent with the policy of the Department of Justice regarding 18 U.S.C. 1461, as set forth in *Redmond* v. *United States*, 384 U.S. 264.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on two substantive counts of mailing obscene material, in violation of 18 U.S.C. 1461, and of conspiring with one Cucitro (a co-defendant convicted on the conspiracy and one substantive count) to commit those violations. 18 U.S.C. 371. On March 4, 1968, he was sentenced to concurrent terms of imprisonment of two years subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed (Pet. App.).

The evidence, which is set forth in the opinion be-

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which to file the present petition for certiorari was thus made more than thirty days following the denial of rehearing and was out of time under Rule 22(2) of the Rules of this Court.

low at Pet. App. 18–19, is not in dispute. Briefly summarized, it showed that petitioner and Cucitro arranged for two other persons, a man and a woman, to act out a scene of sexual intercourse at a motel in Phoenix, Arizona, which petitioner and Cucitro would photograph. The scenes were photographed with one motion picture camera using black and white film and another using color film. Petitioner and Cucitro took the black and white film to a local camera store in Phoenix where an employee advised petitioner that the film would have to be developed by a commercial film processor in Denver. Petitioner gave the film to the employee, who mailed it to the film processor in Denver. After developing the film, the processor turned it over to a United States Postal Inspector. The color film, pursuant to a contractual agreement covering it, was mailed directly by petitioner to the same film processor in Denver, who developed it and then turned it over to the Postal Inspector. The parties stipulated at trial that the motion picture films were obscene within the meaning of 18 U.S.C. 1461.

ARGUMENT

1. Petitioner contends that the trial judge erred in refusing to give his requested instruction that the jury could not convict unless it found that, as the sender of the materials, he "specifically intended at the time of the mailing that the materials when received and viewed by the recipient would arouse or appeal to the prurient interests of the recipient" (Pet. 5). As the court of appeals held, however, even had

such an instruction been appropriate at all,[2] it would have been so only to the issue of the obscenity of the mailed materials. It had no proper bearing on the type of specific intent required for a violation of Section 1461. Having stipulated that the materials were legally obscene, presumably in order to avoid having the jury view them, it is not open to petitioner to contend that the court failed to give an instruction pertaining to the obscenity of the films. The trial judge correctly charged, with relation to the issue of specific intent, that the jury could convict only if it found that petitioner had participated wilfully in the crime. The court defined participation as wilful "if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law"

[2] An instruction that the sender must have intended that the materials appeal to the prurient interest of the recipient has been held erroneous under the standards for determining obscenity set forth in *Roth* v. *United States*, 354 U.S. 476 and *Memoirs* v. *Massachusetts*, 383 U.S. 413. See *Armijo* v. *United States*, 384 F. 2d 694 (C.A. 9), certiorari denied, 390 U.S. 974; *Ackerman* v. *United States*, 293 F. 2d 449, 453 (C.A. 9). Thus, even had the issue of obscenity in this case not been conceded, the denial of petitioner's requested instruction would have been correct. The proper standard is whether the content of the material would have a prurient appeal for the "average person" or an intended sexually "deviant group"; *Mishkin* v. *New York*, 383 U.S. 502, not whether it would be regarded as prurient by a particular recipient. See Memorandum in Opposition in *Armijo*, *supra*, No. 917 Misc., O.T., 1967.

(R. Vol. III, 276). This instruction was proper [3] and would, as the court below noted (Pet. App. 22), exclude the case alluded to in petitioner's brief of a law enforcement officer who sent the obscene materials through the mails for use as evidence.

2. Petitioner raises various contentions concerning the propriety of his prosecution under the policy of the Department of Justice with respect to 18 U.S.C. 1461, announced in *Redmond* v. *United States,* 384 U.S. 264. There, upon the suggestion of the Solicitor General, this Court vacated convictions under Section 1461 and remanded to the district court for dismissal of the information. *Redmond* involved a husband and wife convicted for having sent and received obscene photographs of each other through the mails. In our memorandum we pointed out that the Department's policy was to prosecute for mailing and receiving private correspondence only in "those cases involving repeated offenders or other circumstances which may fairly be characterized as aggravated," since it "is the Department's view that generally no useful purpose is served by a felony conviction of individuals who have willingly exchanged private letters, although obscene" (Memorandum for the government in No. 1056, O.T., 1965, p. 4).

The court below held that the *Redmond* policy could not be enforced by the courts but only by United States prosecutive officials, who had not moved in this case for dismissal of the charges; and that, in any event, this case did not fall within the class of cases

[3] See *Gagliardo* v. *United States*, 366 F. 2d 720, 724 and n. 5 (C.A. 9).

which the Department announced that it would not prosecute (Pet. App. 20–21). We regard prosecution of the present case as consistent with the policy set forth in our memorandum in *Redmond*. The critical distinction is, as the court below noted (Pet. App. 21), that unlike in *Redmond* (and see also *Cox* v. *United States*, 370 F. 2d 563 (C.A. 9)), there is no showing here that the materials were for the private use of petitioner and his co-defendant. Indeed, the photographing in both color and black and white motion picture film of "actors" engaging in sexual intercourse suggests an entirely different use than the "private correspondence" contemplated by the Department's policy announced in *Redmond*.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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